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IN THE SUPREME COURT OF THE UNITED STATES.

Filed Oct. 4, 1901.

JOHN W. McDONALD, Receiver of the Capital National Bank of Lincoln, Nebraska.
Appellant

vs

DAVID E. THOMPSON.
Appellee

95

Brief for Appellant.

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Appellant

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Appellee

BRIEF FOR APPELLANT.

This was originally an appeal to the United States Circuit Court of Appeals, eighth circuit, from a decree of the United States circuit court for the district of Nebraska, sustaining a demurrer by the appellee to the bill of complaint of the appellant and dismissing the bill with costs.

The amended bill alleged, in substance, that the Capital National Bank failed on the 23d day of January, 1893; that thereafter appellant was appointed receiver of the bank by the comptroller and was then engaged in winding up its affairs; that on the 10th day of June, 1893, the comptroller of currency made and published an order assessing the stockholders of the bank to the amount of the

par value of the shares, payable July 10, 1893, for the purpose of paying the depositors and creditors, in accordance with sections 5151 and 5234 R.S. U.S.; that "on the 23d day of April, 1891, and for a long time previous thereto, the said respondent, David E. Thompson, was the owner of, and had standing in his name, two hundred and ten shares of the capital stock of the said Capital National Bank of Lincoln, upon the books of said association, and that upon and for a long time previous to the said last mentioned date the said defendant, David E. Thompson was a director of the said Capital National Bank; that said shares were created as a part of the original issue of the capital stock of said bank at the time the said Thompson became the owner thereof, and the same, nor any of them, did not come into his possession or ownership by purchase, transfer, or assignment, but that he acquired the same as upon subscription to such capital stock, which fact was and is evidenced by the fact that at that time certificates of said shares, partly printed and partly written, and duly signed by the president and cashier, and sealed with the corporate seal of said bank, were issued and delivered to said Thompson, and with his knowledge and consent registered on the books of said bank as belonging to him, and at which time the said Thompson in writing duly receipted for said shares and certificates to said bank, and in writing upon the books of said bank declare himself to be the owner thereof, and of all the same,

"That on the 23d day of April, 1891, and for a long time prior thereto, and thereafter, until said bank closed its doors, the said Capital National Bank of Lincoln was

in a failing condition, and was in fact insolvent, which was known to said David E. Thompson personally, as well as officially, in his capacity as such director.

That the said David E. Thompson, respondent herein, being fully advised of and knowing the failing condition and insolvency of the said bank, and in expectation and anticipation of the early and near approaching failure of the said bank, and the necessary enforcement of his liability as a shareholder, and to defraud the said bank, its depositors and creditors out of the security afforded by the law upon the shareholders of nationl banks and to render it impossible in the case of the failure of said bank, which the said respondent believed and had reason to believe was imminent, and could not be long delayed, to place it out of the power of the comptroller of the currency to enforce the contingent liability of him, the said respond- David E. Thompson, to contribute not to exceed one hundred cents on the dollar of the par value of the shares of stock owned, and held by him as hereinbefore stated, in case of the failure of said bank and its inability to pay its depositors and other creditors out of the ordinary resources, and without resorting to an assessment upon its capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging and defrauding the said bank, its depositors and creditors, the comptroller of the currency, and the receiver of the said bank, of their lawful rights and remedies in the premises, did, on or about the 14th day of November, 1891, sell and cause to be transferred on the books of the said bank, by proceedings regular in form, but not made in good faith, one hundred and eighty-five shares of the

said capital stock of the Capital National Bank of Lincoln, Nebraska, so acquired, owned and held by him as aforesaid, to Charles W. Mosher and Richard C. Outcalt, whom the complainant has been informed and believes, and, so charges upon information and belief, are, and were at the date last aforesaid, pecuniarily irresponsible persons of or from whom the amount of such assessement of one hundred dollars upon each share of the capital stock so owned and held by said respondent, David E. Thompson, cannot be made by legal process or otherwise. Your orator further avers that the said David E. Thompson being fully advised of and knowing the failing condition and insolvency of the said bank and in expectation and anticipation of the early and near approaching failure of the said bank and its inability to pay its depositors and other creditors out of the ordinary resources and without resorting to an assessment of the capital stock in the hands of its shareholders, and for the purpose of avoiding such liability and cheating, wronging and defrauding the said bank, its depositors and creditors, the comptroller of the currency and the receiver of the said bank of their lawful rights and remedies in the premises did, on or about the 23d day of April, 1891 (but the records of said bank erroneously show said sale was made December 10, 1890), sell and caused to be transferred on the books of said bank, by proceedings legal in form, but not made in good faith, thirty shares of the said capital stock of the Capital National Bank of Lincoln, Nebraska, so acquired, owned and held by him as aforesaid, to Esther C. Barton, whom your orator has upon information and belief and so charges upon information and belief, is, and was at

the date last aforesaid, not a pecuniarily responsible person, of or from whom the amount of such assessment of one hundred dollars upon each share of the capital stock so owned and held by said respondent David E. Thompson cannot be made by legal process, or otherwise," and concluded with a prayer for a recovery from the appellee for an amount of the par value of the shares above mentioned.

To this amended bill the appellee appeared and filed a general demurrer for want of equity and specifically objecting that the action appeared upon the face of the bill to be barred by the statute of limitations of the state of Nebraska. On the 4th day of April, 1890, after argument by counsel the demurrer was sustained and a decree entered dismissing the bill with costs.

Thereafter, in due season, and upon application by the appellant, an appeal was allowed to the United States circuit court of appeals, eighth circuit upon the following assignments of error:

First. The court erred in sustaining the demurrer of the respondent.

Second. The court erred in deciding that this complainant did not have the right to maintain this action against the respondent.

Third. The court erred in dismissing the complainants said action.

Fourth. The court erred in entering judgment in favor of the respondent and against the complainant.

The case was argued and submitted to the United States Circuit Court of appeals at St Louis on January 25, 1900 and on the 21st day of March 1900, the said court rendered its judgment, affirming the decree of the circuit court.

On the 6th day of June, a petition for appeal and assignment of errors was filed in the clerks office of said circuit court of appeals, the assignment of errors being as follows:

FIRST.

The Court erred in affirming the judgment of the circuit court sustaining the demurrer of the respondent to your petitioner's amended bill of complaint and dismissing said amended bill and adjudging that your petitioner pay the costs in said suit.

SECOND.

This court erred in affirming the judgment of the circuit court by which it was decided that your petitioner was not entitled to have or maintain his amended bill of complaint.

THIRD.

This court erred in holding and deciding that your petitioner's amended bill of complaint is founded upon either, a statutory liability or obligation or upon an implied contract, or upon an express contract not in writing.

FOURTH.

This court erred in holding and deciding that your

petitioner's amended bill of complaint, or the cause of action set forth therein, is or was at the time of the beginning of this action barred by the statute of limitations of the state of Nebraska.

On the 6th day of June the said court made an order allowing the appeal prayed for, a citation was issued and duly served, and the complainant now appears in this court praying for reversal of the judgments of the courts below.

While the record does not indicate the fact, the sole ground upon which the circuit court sustained the demurrer to the bill, was that the action appeared to be barred by the statute of limitations. That this was also the ground upon which the circuit court of appeals based its judgment is apparent from the opinions rendered by that court, which opinions being exceedingly short, we copy herein omitting the court's statement of facts.

"The demurrer raises several questions but it is unnecessary to pass on any other than that based on the plea of the statute of limitations. The provisions of the Nebraska statute of limitations appplicably to the case read as follows:

Section 5. Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

"Section 11. Within four years an action upon a contract not in writing, express or implied, an action upon a liability created by statute other than a forfeiture or penalty. Compiled Statutes of Nebraska.

Whether the liability of a stockholder is treated as an express or implied contract not in writing or as a liability created by statute—and confessedly it is one or the other—an action founded thereon,

whether at law or in equity, is barred under the Nebraska statute in four years. Carroll v Green, 92 U. S. 509; Terry v McLure, 103 U. S. 442; Campbell v Haverhill, 155 U. S. 610; Thompson v German Insurance Co., 76 Fed. 892; Butler v Poole, 54 Fed 586; VanPelt v Gardner, 58 Neb 701. 705; Glenn v Marbury, 145. U. S. 499.

"In this case the cause of action accrued on the 10th day of July, 1893, the day fixed by the comptroller of the currency for the payment of the assessment, and suit was not brought until the 20th day of May, 1898, more than four years after the cause of action accrued."

"The circuit court rightly decided that upon the fact of the bill the cause of action was barred, and its decree dismissing the bill is affirmed."

Since the rendition of the above opinion the question whether the liability of the respondent is a statutory liability has been eliminated out of the points for further discussion by the decisions of this court in Whitman vs. Oxford National Bank, 176 U. S. page 559 and Matteson vs. Dent, 176 U. S. 521, where it is decided point blank that the liability of a stockholder as in this case, is a *contract* liability, and not a simple statutory liability, as was contended by counsel for the respondent in their oral and printed arguments in the courts below. It now remains for this court to determine whether the liability of the respondent, as well as the liability of all stockholders of national banks, depositors and creditors of such banks, aggregating in volume almost countless millions of dollars is dependant only upon an *implied* contract or at most, upon an express contract, not in writing, or whether as we contend, such liability is based upon contracts in writing, which furnish greater security for the creditors of such banks, and to escape from which is more difficult.

The learned Judge Caldwell declared in the opinion of the court, that the liability of respondent, was *confessedly* based either upon a contract not in writing, express or implied, or upon a statutory liability. This court has already held that it is not a statutory liability, and so much is not confessed assuredly, and we shall undertake to show that said liability is based upon a contract in writing, and that suits brought for its enforcement are governed by the provisions of section 10 of the Nebraska Code, which immediately precedes section 11, quoted in the opinion, and which reads as follows:

"Section 10. Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment."

Before entering upon the discussion of this question, however, we desire to first present to this court the proposition, which we urged in the circuit court of appeals, that the liability of a stockholder in a national bank, to an assessment by the comptroller, does not become protected by the bar of the statute, until the debts of the bank, for the payment of which the assessment is made, have become barred. For the support of this proposition we beg leave to submit the following:

ARGUMENT.

The contract and liability of the defendant which is sought to be enforced in this action were not entered into between him and the bank, but between him and the creditors of the bank. The order of the comptroller for the enforcement of the individual liability of the shareholders

did not create a cause of action or start the statute of limitations running, nor in any way affect the existence, validity, or duration of the right which belongs to the creditors to have this liability enforced. This suit is not upon the defendant's contract of subscription to the capital stock of the bank nor upon his contract of shareholdership in that bank, but upon his contract as shareholder with the creditors of the bank, which was entered into at the same time by the bank and by himself and the other shareholders jointly, through the agency of the officers of the bank. How he became a shareholder, or whether that fact is proved orally or by writings, is of no importance. The fact when proved establishes the agency. The suit is for the enforcement of contracts and obligations made by the agents. The only proper subjects of inquiry are whether these contracts are valid and subsisting, or, to be specific, whether *they* are barred by the statute of limitations. Unless it appears affirmatively upon the face of the bill that they are so, the defense can be raised only by answer.

The act of congress of June 29, 1876, supplementing section 5220 R. S. U. S., is as follows:

"That when any national banking association shall have gone into liquidation under the provisions of section fifty-two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditors' bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdic-

tion in equity in the district for which such association may have been located or established."

Prior to this enactment there was no specific remedy for the enforcement of the individual liability of shareholders except in those instances in which a receiver had been appointed by the comptroller of the currency. But the statute is remedial only, and provides for the enforcement of the same right or obligation as that which in other cases is enforced by the receiver, and if the creditors' bill was the usual or only remedy employed for that purpose there would have arisen no doubt that the authorities hereinafter cited are strictly applicable to the determination of the nature and duration of the shareholders' liability.

In the light of these authorities, to which we solicit your honor's careful attention, we respectfully submit the following propositions: First that the shareholders' liability is to the creditors of the bank, and to them alone. Second, that in a case like the present the right of action is in the receiver and in him alone. Third, that this right of action arises as soon as, the bank having been found to be insolvent, a receiver has been appointed and continues as long as there remain unsatisfied creditors of the association whose claims are enforcable against the latter. Fourth, that the order of the comptroller directing the receiver to enforce the individual liability of the shareholders to the extent named in the order does not confer upon nor create in the receiver a right or cause of action, but is simply and only an authority for him to execute a right and prosecute a cause which he already

had. This is clear as well from the fact that the order of the comptroller is not specifically required or mentioned in the statute, as from the language of the act from which the supreme court has held, it arises by implication. The statute enacts that the receiver may, "if necessary to pay the debts of the association, enforce the individual liability of the stockholders;" but it is held in Kennedy v Gibson, 8 Wall, 489, that the receiver cannot exercise this right in the absence of a direction so to do by the comptroller, because the latter is alone in a situation to know whether and to what extent the necessity for so doing exists. The right of action is solely in the receiver in all cases for the collection of the assets of the bank, and in only this particular instance is the authority of the comptroller requisite, and that solely for the special reason named. Says the court in Bank v. Kennedy, 17 Wall, 19:

"The language of the statute authorizing the appointment of a receiver to act under the direction of the comptroller means no more than that the receiver shall be subject to the direction of the comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the debts and assets of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do."

It is as though A as the agent, and on behalf of B, has a cause of action in his own name against C, but is not permitted to begin suit thereon until he is authorized or directed so to do by D, another agent of B. In such case it is plain enough that when D tells A to sue he does not create in or confer upon the latter a cause of action,

but simply entitles him to prosecute one which he already has. And further, if D delays giving the authority until the right of action is barred by the statute of limitations in favor of C the order will not revive it. And so in this case, if the comptroller had waited until all claims on behalf creditors against the bank and its stockholders had become barred by lapse of time, his order would not have been effectual to remove the bar. But if the statute begins to run only at the date of the comptroller's order, such might have been its necessary effect.

In our opinion also a specific order by the comptroller to begin this action was not requisite. The necessity which renders such order indispensable did not arise. Those facts and circumstances which render it proper or expedient to enforce the individual liability of shareholders are not pertinent to the inquiry whether it is advisable to seek to enforce that liability against one as transferrer in fraud of the statute, who has ceased to be a shareholder. The receiver is in most cases, for obvious reasons, better capable to decide the question of such advisability than is the comptroller, and hence we think that this case, in this respect, falls within the rule of the decision in Bank v. Kennedy, 17 Wall. 19, and of this court in Hayden v. Thompson, 71 Fed. Rep. 60.

The stockholder's liability, besides being a contract liability, is a liability not to the bank, but to its creditors. As the supreme court say, in Richmond v. Irons:

"Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of the

corporation."

As to these obligations, the shareholders, to the extent of their liability, are to be treated as, and are in legal effect, partners. The officers and agents of the bank, in contracting the indebtedness of the bank, contract at the same time and by the same means, the indebtedness of the shareholders, and, to the extent of the individual liability of the latter, are the agents of the latter as well as of the former, and one liability can be extinguished sooner than the other only by payment. It is for this reason alone that the liability of the shareholder survives against his estate, or his executor or administrator. It is a part of the assets of the bank, so long as the claim of creditors can be enforced against any of the bank's assets.

Thus says Judge Blodgett, in Irons v. Manufacturers National Bank, 21 Fed. Rep. 197.

"So far as the clause of the national bank act which I have quoted has been construed by the courts, it seems to me to have been assumed that it was the intention of congress to make this a contract liability. These cases are, Davis v. Weed, 44 Conn. 569; Hobbs v.. Western National Bank, 9 Fed. Rep. 469; Davis v. Stevens, 17 Blatch. 259; Laing v. Burley, 101 Ill. 591. From all the various provisions of the act, it seems to me that it was the intention of congress to make this liability, to the extent of the par value of the stock, over and above what the stock had cost, an asset of the bank, to be resorted to in the event of insolvency, or a guaranty fund, so to speak, in case the property of the bank was insufficient to pay its debts. Whoever became a shareholder assumed this liability as an element of his contract. He is declared individually responsible for the liability of the bank, to the extent of the amount of his stock, at the par value thereof, and this

responsibility attaches as soon as the relation of shareholder is assumed, and continues until the relation ceases. * * * It seems to me to be a liability which survives against the estate of the deceased shareholder, to the same extent as if the shareholder had, at the time he subscribed and acquired his stock, signed a written agreement to pay an amount equal to the par value of the stock, on the debts or liabilities of the association, when called upon by the receiver of the bank to do so; and such an agreement undoubtedly would survive as against the representatives of the shareholder's estate."

This doctrine is expressly reaffirmed by the supreme court of the United States in Richmond v. Irons, above cited, the court saying, among other things:

"Admitting that this liability is not strictly an asset of the bank, because it could not be enforced for its benefit as a corporation, nor in its name, yet it is treated as a means of creating a fund to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank."

In Mining Co. v. Woodbury, 14 Cal. 265, concurred in by Mr. Justice Field, who was then a member of that court, and quoted and affirmed in Davidson v. Rankin, 34 Cal. 503, in the construction of an almost exactly similar statute, the court say:

"It would seem, from a just and reasonable construction of the constitution and statutory provisions upon this subject, that an individual corporator, in respect to his personal liability for the debts of the corporation does not occupy the position of a surety, but that of the principal debtor. *His responsibility commences with that of the corporation, and continues during the existence of the indebted-*

ness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their value, should not be impaired by construction. Similar provisions in other statutes have generally been construed in the same manner. It has frequently been decided that the members of a corporation who are answerable personally for the corporate debts and liabilities, stand in the same position in relation to the creditors of the corporation as if they were conducting their business as a common partnership.'

In Allen v. Sewall, 2 Wend. 327, construing a like statute, the court say:

"Individual liability in the act must be understood in contradistinction to corporate liability, and the defendants must therefore be held responsible to the same extent, and in the same manner, as if there was no act of incorporation."

To like effect are

Moss v. Hoagland, 2 Hill 265.

Hager v. McCullough, 2 Denio 119.

And

Corning v. McCullough, 1 N. Y. 47.

one of the syllabi in which is:

"Where the charter of an incorporated company provides that the stockholders should be liable for its debts, and that a creditor may, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover his demand, such stockholders are liable in an original and primary sense like partners, or members of an unincorporate association, and their liability is not created by the statute of incorporation."

In Schalucky v. Field, reported in the 16th N. E. Rep. at page 904, the supreme court of Illinois had occasion to

decide this exact question, and held explicitly and distinctly that a claim against a shareholder, under a similar statute, did not become barred until the expiration of the time at which the claim against the corporation became also barred, saying among other things:

"Inasmuch as the liability of the stockholders to the creditors is primary, and must be regarded as that of partners unincorporate, it follows that the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned. The stockholders owe the same debt to the depositor which the bank owes, and can be sued for that debt just as the bank may be sued, and as soon as the bank may be sued. There is no reason why the remedy should be pursued within a shorter time in the one case than in the other. It is true that the entries in the pass-book are made by an officer of the bank and not by the stockholder, but such officer, in making the written entries, acts as the agent and representative, not only of the corporation entity known as the bank, but of the stockholders regarded as unincorporate partners. The written evidence of indebtedness is as binding upon the latter as upon the former. The liability of the stockholder ends at the same time that liability on the part of the corporation ends, and not sooner."

1 Wood on Limitations, Sec. 140.

And in Fleischer v. Rentchler, 17 Ill. App., 17 Bradwell's Reports 402, the court say:

"The only question arising upon this record for our determination is presented by the action of the court below in holding that the statute of limitation in five years bars the action.

"The defendant in error insists that the cause of action disclosed by the declaration brings the case within section 15 of the general statute of limitations, while the plaintiff in error contends that it is governed by section

16 of the same act. By section 15, all actions on any unwritten contracts, express or implied, must be brought within five years after the cause of action accrued, and section 16 permits an action on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidence of indebtedness in writing, to be brought within ten years after the cause of action accrues. Two different periods are thus fixed in which an action may be brought for breach of contract, not dependent upon the name or character of the action upon which the obligation is to be enforced, but the kind of proof required to sustain the action, whether written or unwritten. If this certificate of deposit be a written contract, or other evidence of indebtedness in writing, binding upon stockholders as a primary obligation, either by their own act or by obligation of law, it would clearly seem that it would fall within the class of actions named in section 16, and not be barred until ten years after it became due and payably."

The court then proceeded to cite and discuss the decisions of the supreme court of that state in several cases, and arrives at the conclusion that a contract, being such an one as was not barred by the statute of limitations against the corporation, was for that reason not barred as against the stockholders, whose liability thereupon was primary, as in the case of other partners, saying:

"Their liability upon the contract was coeval with that of the corporation; both became bound at the same time and by the same contract,—the bank as an incorporation, they as partners, with definite and separate interests represented by the amount of stock held by them respectively and, thus limited, their liability upon the contract creating the indebtedness was co-extensive with that of the corporation incurring it, upon their as well as its own behalf. Their obligation becoming thus fixed and absolute to discharge the debts and liabilities of the corporation according to the terms and conditions of the contract tract creating them, it seems to legally and logically follow

that their liability would continue so long as the debt is a subsisting obligation against the corporation and they still hold stock of the corporation not yet applied to the discharge of such debts and liabilities. Were this not so, the anomalous case would be presented of a statute making these stockholders liable as partners upon the contracts of the corporation at the time of their inception, and yet stand discharged from such original liability from the mere lapse of time, while the indebtedness is confessedly not paid, but is still a valid claim against their representative, the corporation, and will so continue for years. This result could not certainly have been contemplated by the legislature in enacting this provision preserving the personal liability of the members of the company. The object of the legislature clearly was to make them liable for the debts of the corporation in the way and manner the same were contracted, the act of incorporation not availing them in the least if they made default to comply with the contracts thus entered into through its agency."

Now it will not be contended that it appears upon the face of this bill that all or any of the indebtedness against the Capital National Bank, for which the shareholders thus became primarily liable, has been satisfied by payment, or has become barred by the statute of limitations. On the contrary it is a matter of general knowledge that a large volume of this indebtedness remains unpaid, and that, if any of it would have been otherwise barred as against the corporation, it has been kept alive either by the adjustment and allowances by the receiver, under the the directions of the comptroller of the currency, or because of having been prosecuted to judgments against the bank. And inasmuch as these authorities all hold, and appear to be in consonance with the decisions of the supreme court of the United States and the courts of the several states, that the liability of a stockholder is not ex-

tinguished so long as the liability continues against the bank, it seems to us that for this reason alone, if for no other, the demurrer to be overruled.

SECOND:

There is another course of reasoning that leads to the same result. The liability to creditors of a shareholder in a national bank is analogous to the liability of stockholders in other corporations for their unpaid subscriptions upon their shares. The subscriber to shares of capital stock in a bank agrees to pay the par value thereof in installments as provided by the act of congress, and also at the same time and by the same contract, agrees to pay, if required, an equal sum in addition for the satisfaction of creditors of the bank. That this additional liability is a trust fund for the benefit of creditors in every sense in which unpaid subscriptions in other corporations are so, we take it for granted will not be denied. In fact the bank act almost if not quite explicitly declares it so to be. With respect to unpaid subscriptions they are treated as so far a trust that the statute of limitations is held not to run in favor of their subscriber until he has assumed an adverse attitude toward the person entitled to demand their payment. In order to start the statute running there must first be a call or assessment by the board of directors or by a court of equity, and a demand of and refusal of payment. This is the doctrine of the United States supreme court as announced in the below cited cases. Now, when the comptroller makes an order directing the receiver to enforce the individual liability of shareholders the order evidently has reference only to such persons as

are really shareholders and appear as such on the books of the bank, and the receiver fully obeys the order by demanding payment of such persons, and upon their refusal proceeding to collect by suit. It would be illogical as well as inexpedient, for several reasons, to hold that the comptroller's order without demand would create a cause of action or render the shareholder's attitude adverse. In the first place, the comptroller's order is made *ex parte* and not by corporate officers or by a court of whose action the shareholder may be presumed to have had notice, and he ought not to be put to the expense and inconvenience of suit until it has been brought to his attention by demand from the receiver. Secondly, shareholders in such institutions are often widely scattered, and if the statute begins running at the date of the comptroller's order it may often happen that the bar will have become complete in the state or territory of the stockholder's residence before the receiver will have learned his whereabouts so as to be able to begin suit. Thirdly, as we have argued elsewhere herein, the comptroller is not vested with judicial powers or with the right to create, arrest, or continue a cause of action which is solely in the receiver for the benefit of creditors and over which the statute gives the comptroller no authority, except to say when and for what sum it may be prosecuted.

All these reasons, we think, apply with special force to one who has been, but has ceased to be, a shareholder and who has transferred his stock with actual or constructive notice that the bank was, or was likely to become, insolvent: Such a person although he may know of the extent of the insolvency of the bank, and of the comptroll-

er's order, may in many, perhaps in most, cases rest upon the reasonable presumption that his transferee, who has assumed in the language of the statute, all the liabilities of a stockholder, is financially responsible and will alone be looked to by the receiver for the payment of the assessments. At the same time he may be fully aware of his own obligation therefor and be ready to discharge the same upon request, and, perhaps look to his transferee for reinbursement. Or the circumstances may be such that he will have no doubt that his transferree will make the payment upon request, or even without request, so as to save him from the trouble and expense of so doing. Now, it does not seem to us that it can be reasonably claimed that such a person under such circumstances, as soon as the comptroller's order is made, and without actual notice thereof, or demand by the receiver, is bound to hunt up the latter and tender him the amount of the assessment. Although he may be legally liable he may have been guilty of no actual fraud, and of no fraud or deception at all, towards his transferree, who may be morally as well as legally, bound to discharge the obligation and, so far as he knows, at least, financially able so to do. How under such cirumstances can his attitude be considered as adverse until the receiver hai demanded payment from him and been refused. On the other hand the receiver may be ignorant of the circumstances which charge the transferrer with actual or constructive notice of the insolvency of the bank, and may remain so until he has exhausted his remedies against a transferree, at first supposed to be responsible but who finally turns out to be otherwise and until the full period of the statute of limitations, which in

some jurisdiciions is extremely short, shall have elapsed. When for the first time he discovers these facts and demands payment from the transferrer ought it to be a sufficient answer for the latter that three or four years have elapsed since the date of the comptroller's order? We think not, but that it ought to be a sufficient reply to such an answer that the transferrer's liability was a trust fund; that whoever else was ignorant or negligent, the trustee had been at all times familiar with the facts that created and preserved the trust and that he had given no indication of an intention to repudiate it until his refusal of the receiver's demand, and that therefore, prior to such refusal, there had been no reason in law or in morals for beginning a suit against him for the recovery of moneys which, for aught that was known, he was ready to pay on request.

In Glenn v. Howard, 81 Ga. 383, 8 S. E. Rep. 636, a corporation became insolvent and made a general assignment for the benefit of creditors. After the lapse of more than the period of limitations a bill in equity was filed against the corporation, pursuant to the prayer of which, among other things, an account was taken and a decree entered making an assessment upon shareholders, who were not parties to the suit, for a part of their unpaid subscriptions to the capital stock. This decree was not entered until fourteen years after the date of the assignment, and nine years after the filing of the bill: The period of limitations in Georgia where the defendant Howard resided and was sued on the decree, was five years. The defense was the statute of limitations. The court say:

"Under the facts alleged in the delaration, was the cause of action barred? The supreme court of Virginia in a similar suit, involving the same question (Vanderwerken v. Glenn, 6 S. E. Rep. 806) held that the statute of limitations did not commence to run until after the call was made under the decree above referred to. The supreme court of Maryland, when the question came before it, held to the same effect. (Glenn v. Williams, 60 Md. 95.) The supreme court of Alabama, in a case involving the same question (Glenn v Semple, 80 Ala. 159) likewise held that the statute of limitations did not begin to run until this call was made. Here, then are three courts of last resort in three different states of the Union that have directly decided the question made in this case. We are aware that there is a decision to the contrary by Judge Brewer of the United States circuit court (Glenn v. Dorsheimer, 23 Fed. Rep. 695), in which it was held that where an insolvent corporation ceases to do businesss and assigns all of its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in its favor and against such trustees and creditors immediately. And this is the only decision to the contrary that we have been able to find directly upon the question. Other cases have been referred to by learned counsel who argued the case, which seem to look in that direction,—and I must say for myself that there is a good deal of reason in favor of the decision of Judge Brewer—but the weight of authority is unquestionably against the ruling of the court below in this case. Under the act incorporating this company, a call was to be made upon the stockholders for their unpaid subscriptions, whenever necessary, by the president and directors of the corporation. No such call was ever made, and in the deed of assignment no authority was given to the assignees to make a call; and it is a rule in chancery, well recognized and uncontroverted, that whenever the subscribers fail to pay up their stock, and the officers of the corporation will not make the call, a court of chancery will make it, at the instance of any creditor, as was done in this case. When the call was made under the decree in this case, it became a call as effectually as if it were made by the officers of the corporation, who were au-

thorized by the charter to make it. Until this call was made, the statute of limitations did not commence to run."

Since the rendition of the above opinion, there have been decided to the same effect,

Glenn v. Saxton, 7 Pac. Rec. (Cal.) 420.
Aldrich v. Gates, 95 Fed. Rep. 78.
Western Nat, Bank v. Recklen, 96 Fed. Rep. 70.
Scoville v. Thayer, 105 U. S. 143.
Hawkins v. Glenn, 131 U. S. 319, 9 S. C. R. 739.
Glenn v. Liggett, 135 U. S. 353, 10 S. C. R. 867.

In Hawkins v. Glenn, *supra*, the court, discussing the question when the attitude of the stockholder, who is held to be a trustee *sub modo*, becomes adverse so as to start the running of the statute of limitations, and the necessity therefor of a demand upon him, or its equivalent, say:

"Unpaid subscription are assets, but have been frequently treated by courts of equity as if impressed with a trust *sub modo* upon the view that,, the corporation being insolvent, the existence of creditors subjects these liabilities to the rules applicable to funds to be accounted for as held in trust, and that, therefore, statutes of limitations do not commence to run in respect to them until the retention of the money has become adverse by a refusal to pay upon due requisition."

And again, quoting from Scoville v. Thayer, 105 U. S. 143:

"There was no obligation upon the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed

the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company his obligation was to pay the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete."

And it was held that

"When stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. But under such circumstances, before there is any obligation upon the stockholder to pay, without an assessment and call of the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the statute of limitations does not begin to run in his favor until each order or demand."

And in Aldrich v. Gates, 95 Fed. Rep. 78-81, it is held that in the case of an actual shareholder of a national bank the order of the comptroller does not suffice until followed by an actual demand. And in Glenn v. Williams, 60 Md. 93-124, the court say:

"It was only from the time of the assignment made by the decree of the court in Virginia that the statute of limitations began to run; and it was only from that time, *or the time of demand made by the defendants for payment of the assessment*, that the right of action accrued to the plaintiff as trustee."

If the foregoing propositions are sound the demurrer

ought to have been overruled. The defense of the statute of limitations cannot be raised by demurrer unless the bill discloses affirmatively that the cause of action sued upon is barred. Thus, Hazard v. Dillon, 34 Fed. Rep. 485, was an action against trustees for an accounting and distribution of dividends and profits upon the completion of a trust concerning the construction of a railroad. The defense of limitations was sought to be raised by demurrer, but was overruled because the bill did not "show upon its face when the road was completed or when the right to final accounting accrued;" and Brown v. Rins, 106 U. S., was a bill to obtain an accounting from an agent to whom moneys had been entrusted for investment. The circuit court dismissed the bill on demurrer upon the ground that the suit was barred by the statute of limitations, but the supreme court overruled this decision, saying:

"It does not appear from the bill that the defendant intended, by investing in the particular mode stated in his letter, to assume a position of hostility to his principal, or to hold the proceeds, if any, of that investment, in his own right. As therefore, it does not clearly or distinctly appear from the bill that the suit was barred by limitations, the demurrer should have been overruled."

This is the rule also in Nebraska, in Mills v. Rice, 3 Neb. 76, which was an action for damages for breach of covenant of warranty. The court say:

"In respect to the statute of the limitations raised on the demurrer, it is only necessary to remark that the face of the petition does not show when the right of action accrued by reason of ouster and dispossession of the premises, and therefore, so far as the action rests on the breach of the covenants of warranty, and for quiet enjoyment,

this ground of defense is not well taken by demurrer."

THIRD.

But if the action is held to be upon the contract of subscription or of shareholdership, it seems to us that the conclusion must be the same, because in such case the contract, as is alleged by the amended bill, is in writing; that is to say, the evidence of such contract and the whole of such evidence is written. The statute of Nebraska upon which the contention arises is as follows (Code of Civil Procedure, section 10):

"Within five years, an action upon a specialty or any agreement, contract, or promise in writing or foreign judgment."

Section 11: "Within four years, an action upon a contract not in writing, expressed or implied. An action upon a liability created by a statute other than a forfeiture or penalty."

In our view this question is free from complication, and easy of solution.

The liability of the shareholders is said by the supreme court in Stuart v. Hayden, 169 U. S. 1, 18 S. C. R. 274, affirming Richmond v. Irons 121 U. S. 27, 7 S. C. R. 788, to be "An essential element in the contract by which the stockholders become members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock."

Now, this contract, whether it be one of original subscription at or prior to the date of corporate organization,

or whether it be by accepting and receipting for certificates of shares of stock originally issued to another, and procuring the transfer to be made upon the books of the bank, is, and of necessity must be, a contract in writing. As is said by Judge Campbell, in Railway Co. v. Duncan, 28 Mich. 147:

"It has never been provided by law, so far as I know, that anyone can become an original owner of stock by contract without some written subscription or undertaking in such manner as the law allows. * * * There is no common-law method of becoming a stockholder in a statutory corporation:"

In Lewis' Administrator against Glenn, 6 S. E. Rep 866, the supreme court of Virginia, in discussing this question, says:

"But it is strenuously contended that this is not an action founded upon a promise in writing, but upon a mere chose in action, and does not come within our statute (section 17, ch. 141, Code 1873,) which authorizes an assignee to sue in his own name only on 'any bond, note or writing not negotiable;' and that, as a chose in action is not assignable at common law, and is only made so by our statute when in writing, the plaintiff, it is said, had no right to sue in his own name. If the action could be considered as founded solely upon the subscription, that subscription being in writing, and not negotiable, the assignee, under the terms of our statute, would clearly have the right to sue in his own name; he having been as already shown, invested with complete authority to do so. But the action is not founded upon the subscription alone, for it is obvious that upon it, without more, no right of action would ever accrue, but it is founded upon the contract obligation of the subscriber to contribute to the capital stock of the company; and this contract becomes mutual and binding when the subscription is duly made and ac-

cepted. The contract obligation thus perfected constitutes a foundation for an action but no right of action accrues thereon until an authorized call is made. It is frequently the case that more or less confusion arises from a failure to distinguish between the cause and the right of action. 'A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however an obvious distinction between a cause of action and a right, though a cause of action usually confers a right. Thus statutes of limitations do not affect the cause of action, but take away the right.' (1 Bouv. Law Dict. 247.) Hence in Patterson v: Lynde 106 U. S. 521, 1 Sup Court Rep. 432, it is said: 'The liability of the stockholder is upon his subscription, that is to say, upon his obligation to contribute to the capital stock." It is therefore clear that the present action is not founded upon the subscription alone, nor upon any mere implied obligation, but upon the contract obligation perfected by subscription, duly made and accepted, and the default of payment as required by the call judicially made. In this case, as both the fact of subscription and that of acceptance, too (as we shall presently see), are in writing,—that is, evidenced by writing, and not negotiable,—why is it not assignable under our statute? And why may not the assignee sue thereon in his own name? Why is not a contract evidenced by writing as much as made through ordinary course of mail where one party proposes and the other accepts by like means? The peculiar value of the writing is in its evidential character, and it is not essential to the validity of a contract thus evidenced that the written evidence of both proposal and acceptance should be on the same piece of paper. Hence the subscription is conceded to be in writing, and the books of the company fully recognize the alleged subscriber as being such."

A man may be estopped *in pais*, or by parol, from denying that he became a stockholder or shareholder in such corporation; that is from denying that he has made the contract: or he can be held, as in the case cited from Bissell by counsel for defendant, to have become a stockholder because his agent has entered into a contract in

his behalf and for his benefit, although in the agent's name; or under some circumstances he may be held liable as though he was a stockholder, although he is not one. But whenever it is alleged that he is or has been a stockholder, or member, in fact, the allegation can be proved only by showing that he entered into an express contract and that contract can be expressed only in writing.

An oral contract of subscription, or an oral transfer of corporate shares, so as to render the person making it a member of the corporation, would be such a thing as has never before been heard of. An oral agreement, upon sufficient consideration, may make one the equitable owner of shares, with the corresponding rights and obligations, including the right to be invested with the legal title and installed as a legal member, but with such a situation we have nothing to do in this case. The bill alleges that the shares in question were acquired by Thompson at the date of their original creation, certificates therefor being at that time issued and receipted for by him; and in the absence of such allegation it will be presumed, from the fact of his having been a shareholder as alleged in the bill, that he was an original subscriber.

Pittsburg Ry. Co. v. Appleget, 21 W. Va. 172.
McHose v. Wheeler, 45 Pa. St. 32.
Turnbull v. Payson. 45 U. S. 148.
Glenn v. Orr, 2 S. E. 538.
Jackson v. Trear, 20 N. W. 764-769.
Galveston Hotel v. Bolton, 46 Tex. 633.

When a person becomes a member of a corporation,

whether by original subscription or by purchase of its shares, he becomes expressly bound by the act of incorporation and the articles of association. Whatever rights and liabilities these instruments make applicable to members are read into his contract of membership as fully to every intent and purpose as though he had subscribed his name to the instruments themselves. This proposition is so well settled as to be almost self-evident, and citation of authorities in its support would be an act of supererogation. The four years statute of limitations applies to "contracts not in writing, expressed or implied."

No one can become the legal owner of corporate stocks, or the legal member of corporations by implication, but only by an express contract or agreement. There is only one way in which that contract can be expressed, and that is, by written subscription to or assignment of shares of stock which may be evidenced by certificates and transferred upon the books of the bank, as provided in section 5139, U. S. R. S.

A conclusive answer, as it seems to us, to the reasoning by which counsel for defendant support their contention, that the liability of the stockholders is statutory, is found in the language of the supreme court in Richmond v. Irons, 121 U. S. 27, 7 S. C. R. 788, and repeated and affirmed in Stuart v. Hayden, 169 U. S. 1, 18 S. C. R. 274. Say the court:

"Its obligation (that of individual liability) becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the

stockholder instead of by the corporation. There is nothing in the statute to indicate that obligation arising upon these undertakings and promises should not have the same force and effect, *and be as binding in all respects, as any other contracts of the individual stockholders.*"

That is to say, the receiver enforces a contract which was made, not with the corporation, but with its creditors, which, for that reason, the corporation cannot enforce, nor the receiver in its behalf, but which he does enforce on behalf of the creditors alone, and this contract is in writing. Counsel do not seem to discriminate between an implied contract and that which the contract implies. They are quite different things. The statute imposes no liability except upon such persons as have entered into the contract. Hence, in order to tender a cause of action, the complainant must plead and prove the contract; and this can be done in only one way, that is, by the written records of the corporation. It is immaterial that this statutory covenent is not transcribed upon those records or copied into the certificate of shares. By force of the law it is as much a part of them as if it had been.

Possibly an illustration can make this clearer. The statutes or Nebraska provide, that, in the absence of an express contract as to interest, obligations for the payment of money shall bear interest at the rate of 7 per cent per annum from and after the date of maturity. Suppose I give you my promissory note payable ten day after date for $100. Four years and eleven months after date I pay you $100, which is the only sum mentioned in the note. Then four years and eleven months still after the date of this payment you sue me for the five years interest

thereon. Is there any doubt that this action is on the note, or as to which period limitation applies? Would the case be different in any way if the note had read "ten days after date I promise to pay $100 with interest thereon at the rate of 7 per cent per annum from maturity until paid?" Did I not, by agreeing to pay the $100, agree to pay the interest after maturity? It is true that this agreement would not exist but for the statute, and that it is not expressed, but implied, but it is implied not independently of, but in and by the contract. If the contract had been oral it would have been barred in four years, and its implied obligation would, of course, have been barred with it; but it being in writing, the implied obligation continues until it is itself extinguished.

So, the contract of the shareholders being in writing, the implied obligation "arising out of it," as the supreme court say, will not be barred until after the lapse of such time as would bar any other written obligation, because, as the supreme court again say, it is "as *binding in all respects* as any other contracts of the individual stockholder."

Even if, for the sake of argument, we admit that a person CAN become a stockholder in a national bank by an oral contract, nevertheless such a fact would be without force in a case where the shareholder actually did receive written certificates of stock and receipted for the same in writing. A might borrow $500 of B, and not give his note for the same, but promise orally to repay it in ninety days. If suit were brought, it would have to be brought, within four years of the date when the sum became due.

But if a note were given, the five-year statute would govern. The reasoning of respondent's counsel is to the effect that, because suit must be brought on an oral agreement within four years, if the same agreement should happen to be in writing nevertheless the suit will be barred in four years.

To recur to our illustration of the note which fails to designate any rate of interest. By the terms of our statute such a note would bear 7 per cent interest after maturity. By the reasoning of respondent's counsel the contract to pay 7 per cent interest after maturity would be an *implied* contract, for the recovery of which suit would have to be brought within four year after maturity. We would then have the ridiculous spectacle of a plaintiff suing on a note after four years, and before five years after maturity, recovering the principal of his debt, but barred from recovering his interest, because the contract to pay the interest was an implied contract and barred after four years.

We regard this illustration as exactly in point and fair to the position of council, and we submit that it is an excellent case of "*reductio ad absurdam.*" If the respondent's contention is correct, it certainly follows that A cannot recover his 7 per cent interest from B unless he commences suit before the expiration of four years from the time the debt became due. To show that a party can be held liable upon a contract in writing, without his signature being subscribed to such contract, and that the acceptance of a certificate by defendant was equivalent to signing, and makes his contract a written one within the

meaning of the statute of limitations, we submit the following authorities:

Plumb v. Campbell, 18 N. E. (Ill) 790, Wilkin, J.

This case originated in the circuit court on a declaration on asumpsit to which the defendant below interposed the five year statute of limitations. The first plea avers that the contract sued on was not in writing, and the second that it was partly in writing and partly by parol, to both of which appellee replied that it was a contract in writing. The writing relied on was a contract to sell certain bonds for plaintiff at a certain price, and signed by defendant alone. Plaintiff delivered the bonds and maintains that this is a wrttten contract on which he might bring his action at any time within ten years under section 16, ch. 88, Revised Statutes, while appelant contends that it could only become an agreement when decided by parol evidence, and is therefore an oral contract governed by the provisions of section 15 of the same chapter, barring the action in five years. The contention of the appellant is that, for want of an agreement on the part of appellee to do anything on his part as shown by the writing, there is want of that mutuality which is necessary to every complete contract. But a promise lacking mutuality at its inception becomes binding on the promisor after performance by the promisee,(Willitts v. Ins. Co., 45 N. Y. 45, citing Train v. Gold, 5 Pick, 380; Hilton v. Southwick, 17 Me 303; L'Amoreux v. Gould, 7 N. Y. 349; R. R. Co. v. Graff, 27 Ia. 99, R. R. Co. v Bartlett, 3 Cush. 224.) Proof of assent on the part of promisee is not necessary. It is sufficient if the required act is performed by him. (Hare,

Cont. 304.) We perceive no reason in distinguishing this from an ordinary contract in writing, in applying the statute of limitations, and therefore hold that the action was not barred.

Kennedy v. Siemers, 25 S. W. 512, McFarlane, J.

Grantors in a trust deed who did not sign the contract with the defendant were bound by its conditions and covenants, when they received benefits under it, and one of them made a written assignment of it, which was attested by the others. "We think there is no significance in the fact that the Siemers agreement was not signed by Brault and Bunch, the other parties interested in and to be benefited by it. Its acceptance by them was sufficient to bind them to its covenants and conditions." Citing Ferry Co. v. Chicago & A. R. Co., 73 Mo. 403; and Heim v. Vogle, 69 Mo. 529.

Indianapolis Nat. Gas Co. v. Kibby, 35 N. E. (Ind.) 392. Howard, J.

Contract giving party of second part right to bore gas wells on a certain tract of land. Signed by party of first part, accepted and recorded by party of second part. "Appellant's contention is that this court has never been in force, for the reason that it was not signed by the party of the second part. This question has been expressly decided against the position assumed by counsel. The signing and acknowledgment of the instrument by the party of the first part, and the acceptance and recording thereof by the party of the second part, make it a contract between the parties," citing Railway Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, and Harlan v. Gas Co., 32 N. E. (Ind.

Sup.) 930.

Rigdon v. Conley, 30 N. E. (Ill.) 1060, Craig, J.

A written contract between defendant and plaintiff signed by defendant and found in the possession of the plaintiff is admissible in evidence on behalf of plaintiff, although it has not been signed by him, since by his acceptance of it the contract has become binding on him. (Syllab.) "The theory of this instruction," an instruction the refusal to give which is alleged as error, "is that the contract existing between the plaintiff and defendant required the plaintiff to pay in cash $7,000 into the hands of Rumsey & Co. The written contract introduced in evidence will not admit of that construction."

McCampbell v. M'Faddin, 9 S. W. (Mo.) 138, Mabbie, J.

"When one party to a written contract signs, and the other accepts it without signing, the one failing to sign is as fully bound as if he had signed, and, as a consequence, is also entitled to its benefits to the same extent as if he had signed."

Grove v. Hedges, 55 Pa. St. 516.

It is assuredly plain law that if a party, who has not put his name to a written contract, accepts it when signed by the other party, it binds him the same as if he had signed it.

Vogel v. Pekoc, 42 N. E. 386.

Contract for hiring signed by one party only. "It will be observed that the written contract was not signed

by the parties named therein as parties of the first part, and it is insisted by the plaintiff that, as they failed to sign the contract, it never became binding upon him or any other person. The acceptance of the contract by the parties of the first part and holding it and acting on it as a valid instrument, may be regarded as equivalent to its formal execution on their part."

Johnson v. Dodge, 17 Ill. 440.

Contract to sell land made by an agent for principal and not signed by vendee, but accepted by him and part of the purchase price paid. *held*, "In this case the contract, if Inglehart had authority to make it, is the contract of Dodge and in writing; and it is the settled construction of the statute of frauds that the authority *to the agent* need not be in writing.

Stone v. Pennock, 31 Mo. App. 544.

Griffin v. Bristle, 40 N. W. 523.

Action for conversion of wheat delivered to defendant, and following received in return: "No. 92. Carver station, Sep. 13, 1886. This is to certify that L. H. Griffin has stored 123 1-6 bushels No. 1 hard wheat for shipment to G. W. Ehle & Co., Minn., Christ. Bristle, buyer." The testimony of plaintiff as to his not knowing anything about Ehle & Co. was insufficient to impair the effect of this written instrument. The fact that this instrument was signed by only one of the parties does not prevent its operative effect as evidence of the contract.

Bradon Mfg. Co. v. Morse, 48 Vt. 327, Pierpont, Ch. J.

The contract upon which this action is brought is in these words: "I hereby agree to deliver to the Brandon Mfg. Co. at their works in Brandon before March 15, 1872, 100 cords of beech and maple wood, etc., for the sum of $4.75 per cord." and signed by Morse. This contract was accepted by plaintiffs, who are now trying to enforce it. When this contract was accepted, it became binding on both parties the same as if it had been signed by both. The time when the payments are to be made is not fixed by the contract, but the law fixes it as definitely and with as much certainty as it could be by words. The legal force and effect of the contract is that the plaintiffs should pay for the wood at the stipulated price when delivered on demand. There is no ambiguity about the contract that requires explanation by parol testimony. Parol testimony is no more admissible to vary the clear and settled legal meaning and effect of a contract than to vary its terms. It would hardly be claimed that it was competent under such a contract as this to show by parol that payment was not to be made until some time subsequent to the time when the 100 cords of wood should be delivered. Yet such testimony would be just as admissible as like testimony to show that the wood or any part of it was to be paid for before it was all delivered.

Bulwinkle v. Cramer, 3 S. E. (S. Car.) 776, McGowan, J.

Contract was as follows:

"May 17th, sold H. Bulwinkle & Co.
5000 bu. mixed sacked corn at 71½c
1000 " " " " at 80½c
Schooner shipment, payable on arrival. No wharfage.
(Signed) CRAMER & BLOHME."

Held that this is not a mere memorandum, but is a complete written contract between the two parties, and parol evidence is not admissible to show that the subscribing party contracted as agents, and not as principals. Cites and quotes from following English cases: Meyer v. Everth, 4 Camp. 22; Powell v. Edmonds, 12 East. 10; Smith v. Jeffreys, 15 Mees. & W. 560; Greases v. Ashlin, 3 Camp, 426; McClannaghan v. Hines. 2 Strob. 122; and Gibson v. Watts, 1 McCord, Eq. 490. All of which hold the same way on almost exactly the same kind of contract. Court say, "We think that the paper proved in this case was a contract in writing of both parties within the rule as to the exclusion of parol evidence."

A covenant in a deed that the grantee shall assume and pay an incumbrance upon the granted premises is the contract of the grantee in writing although not signed by him and is not barred until the lapse of five years. Shumaker v. Sibert, 18 Kans. 104, opinion by Justice Brewer. And in Howell v. Roberts, 29 Neb. 483, it is held that a suit to recover against stockholders because of failure to publish statements is a suit upon a contract, the limitation being the same as in other contracts.

In support of their contention in argument counsel

cited Thompson v. German Ins Co., 76 F. R. 892 and Thompson v. German Ins. Co. 77 F. R. 258.

The most cursory reading of these decisions will show that the receiver did not present to Judge Shiras the question which is raised in this case, and it did not have any consideration, nor indeed does it appear to have been even thought of. Both plaintiff and defendant conceded from the start that the four-year statute of limitations applied and the only question before the court was when the four years commenced to run. The above decisions have no value whatever in considering this case.

Judge Shiras held in the above case that the action by the receiver was upon a liability created by statute. It seems that Judge Shiras' attention had not been called to Carroll v. Green, 92 U.S. 509, where the supreme court of the United States expressly held that it was an action upon a contract. Counsel for appellee cite both decisions as authorities in their favor, and claim that Judge Shiras has settled the question *in this district* in one way, while it would appear that the supreme court had settled the same question for the *whole country* in a contrary way. The case of Carroll v. Green will not bear out the construction which counsel attempt to give it. On the contrary, a careful study of this case will, we feel satisfied, convince this court that it sustains our position. It becomes important in this place to again call the court's attention to the distinction between an implied contract and what is *implied by the contract*. In Carroll v. Green the supreme court only pointed out what was to be *implied by the contract*. The contract itself was express. Counsel for appellee attempt

to show that the case of Hayden v. Thompson, 17 C. C. A. 592-600 is applicable to this, and because the court in that case held that a suit to recover dividends unlawfully declared and distributed was upon an implied contract by the stockholders to restore the money, they contend that it follows that this suit is also based upon an implied contract. Our answer to that contention is, the right to recover the dividends did not grow out of the national bank act at all. It was a common law right of action, and could have been maintained by the receiver of a state bank. It was an action for money had and received. Further comment on this point seems unnecessary.

In the case of Davis vs. Weed, 44 Conn. 569, the court in its opinion on page 581 say:

"The original liability of the intestate to pay the assessment which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute. *But it also exists by virtue of the contract which the intestate entered into when he became a stockholder.* When a stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed and so long as it, through the executor or administrator, holds the stock as the property of the estate and the stock has not been transferred on the books of bank, and the liability has not been discharged by same act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock, it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud. (Corn-

ing v. McCullough, 1 Comst. 47; Bailey v. Hollister, 26 N. Y., 112; Loury v. Inman, 46 N. Y. 119; Hawthorne v. Calef, 2 Wall. 22. Gray v. Coffin, 9 Cush. 192.)"

The position taken by by the court in that case exactly sustains our contention.

We will also call your honor's attention to the case of Howell v. Manglesdorf, 33 Kan. 194, 5 Pac. Rep. 759. The court in speaking of a statute substantially like the one under consideration, say:

"While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation. An action to enforce the same is transitory and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder."

Citing Flash v. Conn, 109 U. S. 371; Dennick v. R. R. Co., 103 U. S. 11; McDonough v. Phelps, 15 How. Pr. 372; Seymour v. Sturgis, 26 N. Y. 134.

The circuit court of appeals, second circuit, so lately as July, 1897, had this same question under review, and arrived at the same conclusion, saying:

"The means which the statutes provide to enforce the individual contractual liability determined and fixed the question of the amount which must be paid by each stockholder individually, and which in no manner depends upon what any other stockholder could or ought to pay. As the statute was not penal, it is not important whether the liability is called statutory or one based upon contract. It is statutory because it did not exist at common law, and it is contractual because every one who becomes a member of the company by subscribing to its stock assumes its liability.'" Citing Flash v. Conn. *supra*.

In R. R. Co. v. Clarke, 29 Pa. St. 146-152, the court say:

"The question here is whether one member of the corporation has been legally substituted for another The title of the original stockholder was established by written evidence, and could have no legal existence without it. (Thames Tunnel v. Sheldon, 6 B. & Cres. 341.) The title of the substitute must be shown by evidence of the same character"

Since preparing the foregoing brief our attention has been called to the decision in Scott v. Latimer, 89 Fed. Rep. 843, in which, under the peculiar circumstances disclosed by the pleadings in that case, an assessment was enforced against a stockholder who, for four years, had appeared as such upon the books of the bank, but whose relation with the bank was alleged to have been induced by fraud. In the majority opinion of the court, written by Judge Shiras, it is said that,

"Suits of this character, strictly speaking, are not actions based upon the contract of subscription existing between the corporation and the stockholder."

And in that opinion there are several other expressions to substantially the same effect; but, nevertheless, even the majority opinion proceeds upon the ground, and holds the defendant liable solely because of the fact that he was a stockholder; and under the circumstances it was held that he was not in a position to have his contract of shareholdership rescinded and set aside on account of the alleged fraud. Nothwithstanding these expressions the writer of the opinion was unable to escape the express language of the banking act, section 5151 U. S. R. S., which creates this liability against, and only against, per-

sons who are "the shareholders of every national banking association."

The true doctrine seems to us to have been apprehended and to have been clearly expressed in the dissenting opinion by Judge Sanborn, who says, among other things:

"It is true, as shown in Scoville v. Thayer, and other cases cited, that the stockholders' liability, and the maintenance of the action upon it, is not dependent upon the terms of the contract of subscription, where those terms are in conflict with the law or the statute, as was a contract that the stock was non-assessable. But the existence of a valid contract of subscription, or an estoppel from denying its existence, is a *sine qua non* to the existence of the liability and the maintenance of the action. Without it there can be no stockholder, and hence no liability of the stockholder. Where a contract is induced by fraud, and is rescinded without negligence or delay, as soon as the facts constituting it are discovered, it is as though it had not been, and there remains neither contract nor stockholder nor liability of the stockholder. In all the cases that have been cited in which the liability was enforced, a contract of subscription or purchase which had not been induced by fraud, or which had been ratified after its discovery, existed, and the stockholders in those cases were held because as well said in Pauly v. The Trust Co., 165 U. S. 606, they were the real owners of the stock or held themselves out, or allowed to be held out, as owners in such a way and under such circumstances as, upon principles of fair dealing would estop them as against creditors from claiming that that they were not in fact owners."

So that we think we may say, without fear of successful contadiction, that no case can be found in which it does not appear upon analysis of the opinion that it has not been held that the right of recovery is dependent upon

the existence of a valid contract of shareholdership in a corporation, although one of these cases says that it is unimportant whether this liability be called statutory or contractual. It can only exist in those cases in which there is in fact a contract, and it must arise, if at all, out of the contract, and in the true sense of the word the action must be upon the contract, because, without alleging, and proving the contract, no cause of action is tendered at all. As we have already said, cases may possibly arise where the relationship is established by way of estoppel resting in parol. Whether or not, if such a case should arise, the four years statute would apply to it, is not the subject of the present controversy. In this case the relationship exists by reason of the certificate of shares and a written receipt of the defendant therefor upon the stub book and written records of the corporation; and it is this certificate, this receipt, and these records that constitute the contract of legal stockholdership; and they are all in writing. If the plaintiff is unable to prove the existence of these writings, he cannot recover in this action upon the case stated in his bill. Upon the matter tendered in his bill, the existence of parol contract or parol estoppel cannot be proven. Plaintiff seeks to recover solely upon an express legal obligation created as above stated.

FOURTH.

In the court below counsel for appellee contended that this action should have been brought on the law side of the count, and in their argument relied upon the following authorities:

Kennedy v. Gibson, 8 Wall. 498.
Casey v. Galli, 94 U. S. 673.
Flash v. Conn, 109 U. S. 371, 380.
Bailey v. Sawyer, 4 Dillon 463.

When your honors come to examine the authorities cited you will find that in each case the suit was brought against the actual stockholders who were shown by the books of the bank at the date of the failure to be the owners of stock. It follows, therefore, that all of said cases are worthless as authorities in the case at bar.

It appears from the allegations of the bill that this is an action, *not* against a stockholder, but against one who was *formerly* a stockholder, but *who had conveyed* his shares in the Capital Bank, in order to evade his liability to an assessment, and that the object of the proceeding is to compel him to pay such assessment notwithstanding his said conveyance, because he had at the time knowledge of the insolvent condition of the bank, and made such transfer of his shares for the purpose of avoiding his liability. The case thus presented bears no resemblance to the facts in the cases relied upon by appellee. In the latter there was a simple legal liability, which liability could be fully declared by an allegation that the defendant was a stockholder of the insolvent bank when it closed its doors. No other allegations were necessary except the formal statements that the comptroller had made an assessment upon the stock. How different in the case at bar. In this case, had the complainant stopped with the allegation that Mr. Thompson had once been a stockholder, but prior to the failure of the bank he had conveyed his shares

to other parties, it is evident that he would have disclosed no cause of action. It was necessary to go further and declare that at the time of such conveyance he had KNOWLEDGE of the insolvent condition of the bank and and that he made the conveyance with the *intent* to avoid his liability. Here are two ingredients not necessary to be alleged and proven in an action at law, to-wit, *knowledge* and *intent*. In a suit against an actual stockholder neither "*knowledge*" or "*intent*" is of the slightest consequence. These allegations of "knowedge" and intent" resolve our bill into a bill of discovery, which must of course be brought in equity. It does not seem necessary for us to enlarge upon this proposition. We quote from the opinion of the supreme court of the United States in Bowden v. Johnson, 107 U. S 256, which opinion really makes all argument superfluous. The quotation is as follows:

"It is contended for the appellees that this is not a case of equitable cognizance, because a plain, adequate, and and complete remedy may be had at law. But the case is one of a transfer of the legal title to the stock made to defraud the creditors of the bank. The evidence of title to the stock is the final assignment on the books of the bank. This being a bill for discovery as well as relief and the fraudulent transfer being good between the parties, and only voidable at the election of the plaintiff, it is clear that equity has juridisction to set it aside and enforce the liability of the transferrer."

Incidental to the above question is the point attempted to be made by appellee, contended for in his argument in the court below:

That the object sought is to fix the amount of the de-

fendant's liability at a much greater sum than can be determined by the stock books of the association; that the undoing of a fraud is peculiarly the province of a court of equity, uut that its powers are never exercised in that regard without having before it all parties to be affected thereby; that if a court of equity may set aside a transfer in the absence of one of the parties thereto for the purpose of imposing a liability, it may also set it aside for the purpose of conferring a benefit; that such a rule cannot be tolerated; that the rule is well established that in an action to set aside a fraudulent conveyance the fraudulent grantee is a necessary party defendant; that this is well established in this court by the holding in Hayden, Receiver v. Stuart, which case was affirmed by the circuit court of appeals for this circuit and subsequently reaffirmed by the supreme court of the United States."

It required considerable hardihood for counsel to cite the Stuart case as supporting the principle which he is attempting to apply to this case. If the decision in the Stuart case settles one issue above everything else, it is that a suit may be properly brought against an ex-stockholder to recover an assessment, without making the transferree a party on the ground that the transfer was made with guilty knowledge and intent on the part of the transferrer. Indeed so emphatic was the supreme court on this point that it thrust Gruetter & Joers, the transferees, out of court and set aside a judgment in their favor for nearly $20,000, on the express ground that the contention between them and Stuart was not proper to be adjudicated in the suit by the receiver against Stuart the transferrer, and the court annouced that it was not necessary to adjudicate the question as to the condition of the title to the stock, and it *did not set aside the transfer of the stock to Greutter & Joers* though it *did* affirm a judgment against

Stuart the transferrer. This case ought so. and does, settle the question. The other authorities above cited by counsel for respondent are well enought in cases where the apply. but they have no bearing on this case for relief that can possibly offect the transferrees. They may keep their stock and be welcome to it. We only ask to set aside Thompsons's Transfer in equity so far as itmight relieve him of liability, but not in law so as to affect the transferrees' ownership and their rights resulting therefrom to the slightest extent.

Both of the cases Bowden v. Johnson and Stuart v. Hayden were in equity, and in neither was the title to the shares as between the transferrer and the transferree set aside or attempted so to be, but, because the title had passed out of the transferrer by a formal transfer upon the books of the bank, the aid of a court of equity was requisite for discovering the intent with which the transfer was made, and to set it aside as between the transferrer and the receiver. This is the rule announced in Bowden v. Johnson and adhered to and followed in Stuart v. Hayden without express reference to it. The decree of the court of appeals in the latter case, which was affirmed by the supreme court, left the title to the shares in Gruetter & Joers untouched, and the supreme court said that the issue as to where that title was, or ought to be, was foreign and immaterial to the controversy between the receiver and Stuart. The principle is the same as in a suit in equity by creditors to set aside a conveyance of real estate to a grantee in fraud of the former. By an overwhelming weight of authority

the fraudulent grantor is not a necessary party to such a suit, because the title as between him and the grantee, and his interests, are wholly unaffected by the result. But there has never, on that account, been thought to be any doubt about the jurisdiction in equity. The cases holding that the presence of the grantor is necessary have done so on the sole ground that the suit involved the determination of the amount of *his* debts and an investigation of *his* alleged fraud. But this cause does not involve any such investigation or determination with respect to Thompson's transferees. There is, however, a cloud upon the legal title of the vendor or grantor in the latter case analogous to that in the former, and an obstacle to the enforcement of legal remedies of exactly the same character; and these, as is held in Bowden v. Johnson, afford the reason for the interposition of a court of equity. Complainant is not seeking to collect or enforce any debt or obligation against any of Thompson's transferees, nor does he charge them with any fraudulent or unlawful conduct or intent, nor even with participation with any such intent by Thompson, nor does he seek to deprive them of any property, nor to charge any property in their hands with any lien, or to divest them of any title or legal right. He simply says this: that Thompson, by becoming a stockholder in the bank, had entered into a certain contract relation, in writing, with it and its creditors; that he claims that by reason of the transfer of his shares he has become absolved from that contract; that as appears by the books and records of the bank, and the transfer, his contention is true; but that, by reason of his knowledge of the condition of the bank at the time of the transfer

and the motive which induced him to make the transfer, he is equitably obligated in all respects as though he still remained the legal owner of the shares, and, inasmuch as he cannot now be sued at law as such legal owner, the aid of chancery is invoked to uncover the true nature of the transaction, and to enforce his equitable liability on, as the supreme court say, "his contract of membership."

Besides, we think that the act of congress of June 29, 1876, supplementing sec. 5220 R. S. U. S., was intended to vest in the creditors of the liquidating association the same remedy which was therefore available only by a receiver, to-wit. "A bill in equity in the nature of a creditors' bill" to enforce the individual liability of shareholders.

Since the foregoing was put in type the opinion in De Weese v. Smith, 97 Fed. Rep. 309, has been published and come to our notice. It is by an exceedingly able judge and we are gratified to find it fully in accord with our argument upon both the propositions that the liability of the shareholders is contractual and in writing and that no cause of action arises thereon until demand. Says the opinion:

"It must be conceded that the right of action against the stockholders created by this statute is one arising *ex contractu*. 'As the ownership of stock, in most cases, arises from the voluntary act of the stockholders, he must be regarded as having agreed or contracted to be subject to the obligation.' (Bank v. Hawkins, 174 U. S. 370, 19 Sup. Ct. 742.) So Judge Blodgett, in Irons v. Bank (D. C.), 21 Fed. Rep. 198, said: 'It was the intention of con-

gress to make this a contract liability.' The statute declares what the liability of the stockholder is. Therefore when a stockholder takes his stock the provision of the statute, in contemplation of law, is regarded as written into his subscription. This constitutes his undertaking, the bond of his obligation; and when proceeded against to enforce this liability, it is essentially a declaration on a contract."

In conclusion the opinion holds that a cause of action for the so-called "assessment" does not arise until there has been a demand therefor, and inferentially though this last point was not necessarily involved in the case, that the order of the comptroller constituted a sufficient demand without proof of its having been brought to the personal knowledge of the stockholder.

With the opinion, as a whole, as applied to the facts of the case at bar, we are content; but the citation of King v. Armstrong, 34, N. E. (Ohio) 163, we regard as a strong endorsement by a very high court of the contention in our first point, that the order of the comptroller does not in any way affect the running of the statute of limitations. The reasoning of the Ohio court is so nearly parallel with our own contained in our first point that we will not occupy space by repeating it here. The shareholders' liability is to the creditors of the corporation and for their benefit. When the bank has passed into the hands of a receiver, they are deprived of a right of action which they might otherwise have had for its enforcement. It does not seem to us that their right can be postponed by any act of omission or commission by an officer whom they have not appointed and whose conduct they cannot influence; nor on the

other hand, does it seem to us the comptroller can by any act revive a cause of action which has already become barred, yet either result might accrue from the doctrine that his order creates the cause of action. If, however as we have argued, the contract, being with the creditors, accrues when their cause of action against the bank accrues, and subsists as long as their right continues, just as clearly would have been the case if no right of action had been vested in the comptroller, the analogies of the law will be satisfied, and the statute of limitations will not be pleadable by a stockholder until the obligations of the bank shall be satisfied or the estate fully administered and the receiver discharged.

When the claim of a creditor is allowed by the comptroller or ascertained by the decision of a court it is established not only against a corporation of which the stockholder is a member, but also against a partnership of which he is a member, and he becomes and continues to be bound by it to the extent of his individual liability. just as he would be bound by a judgment against any other partnership of which he was a member. Just as any other partner is a party to any suit or proceeding against his partnership and is bound by the determination of it in every way and to every extent as though he had been individually named therein, so is a shareholder in a national bank a party to and bound by the determination of every prodeeding against the bank as though he had been individually named therein. And until the debts ascertained and determined in the manner provided by law

have been satsified, or the trust has been fully administered and the receiver discharged, he remains bound to the extent of his individual liability as a shareholder.

We think the decree of the circuit court ought to be reversed and the appellee ruled to answer.

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